No. 18642

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILES CONSTRUCTION CORP.

Appellant,

vs.

HELEN H. DEMPSTER, *et al.*,

Appellees.

APPELLEE'S BRIEF.

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Statement of the Case.

On October 8, 1956, one A. T. Locke entered into a written agreement with the appellant, Miles Construction Corporation, whereby the said A. T. Locke contracted to perform certain services for Miles Construction Corporation as a bidder or estimator and to prepare bids or estimates for bids for use by Miles Construction Corporation in the Capehart Housing program (Title 8 of the National Housing Act). [Great American Ex. AA.] Thereafter, A. T. Locke assigned one half of his interest under said agreement to one John Sherman. [Great American Ex. AB] and subsequently, John Sherman and A. T. Locke entered into a further written agreement with the appellant by which certain terms of the agreement of October 8, 1956, were amended. [Great American Ex. AC.]

In its opening brief the appellant concedes that A. T. Locke prepared for appellant estimates for bids for the Little Rock Capehart Housing Project in Little Rock, Arkansas, and that appellant, Miles Construction Corporation, became the lowest acceptable bidder upon said project, entered into the performance thereof, and completed construction in or about May 13, 1960. (Appellant's Op. Br. pp. 6-8 incl.)

In accordance with the agreement of October 8, 1956, as amended, compensation became payable to A. T. Locke and John M. Sherman. The paragraphs of the agreement of October 8, 1956, as amended, pertaining to the compensation payable are as follows and are contained in Paragraphs 11 and 12.

> "11. In the event that Miles is the successful bidder, and in the event that Miles and its principals elect to accept the said contract, as consideration for performance by Locke hereunder, and subject to the faithful performance by Locke of all of the terms and conditions thereof, Miles shall pay to Locke the sum of $100,000.00 if, but only if, the 'net return,' as said term is hereinafter defined, to Miles, resulting from the bidding, entering into, and performance by Miles of a Contract on any of the said Projects is at least three per cent (3%), but less than six per cent (6%), of the total amount of the Contract between Miles and the United States Government; or, if, but only if, the said 'net return' to Miles is six per cent (6%) or more, of the said Contract amount, Miles shall pay to Locke the sum of $150,000.00. Provided, however, that there shall be deducted from any sum payable under this paragraph any

amount which Miles shall have theretofore paid to Locke on account of bidding expense, or otherwise. The said sum shall be payable only in the event that Miles actually enters into a Contract with the Federal Housing Administration and the Department of the Army covering any of the said Projects, and fully performs and completes the said Contract. Said sum shall be payable only after performance, completion, and acceptance of work under said Contract, and only after Miles has received full and final payment under said Contract, or any additions or supplements thereto. Said payment shall be due on or before thirty (30) days after the date on which Miles receives final payment under the said Contract, or any additions or supplements thereto, or the date on which Miles has paid all costs and expenses incident to the performance of said Contract, or the date on which Miles has ascertained, by proper accounting procedures, the amount which would, by this Agreement, be the 'net return,' whichever is the later date." [Par. 15, Findings of Fact; Great American Exs. AA and AC.]

"12. The term 'net return,' as used in the preceding paragraph, is hereby defined to mean the amount by which the total receipts of Miles under the said Contract exceed the aggregate of the cost of all labor, materials, and services expended or incurred in bidding the said Project, performing all acts necessary or appropriate to accomplish the construction, and closing with the Federal Housing Administration and the Department of the Air Force, actual construction, fi-

nancing costs and expenses, and any and all other costs, expenses, charges, fees, taxes (except Federal and State income taxes), deposits, bond premiums, and traveling and other expenses of any nature whatsoever expended or incurred in connection with such project. Without limiting the foregoing, there is specifically included in 'cost,' as used herein, a sum equal to 2½ of all other costs paid, expended, or incurred in connection with the said Project. The term 'net return' shall, for the purposes of this Agreement, be construed as being the amount by which such receipts exceed the costs, before the payment, or setting aside for payment, or any of the following:

(a) Any management or contractor's fee to any of the participants of Miles, except to the extent that any such participant is paid from the said 2%;

(b) Any central office overhead and supervision to any participant of Miles, except to the extent that any such participant is paid from the said 2%;

(c) Any fee to any of the participants of Miles for providing indemnification on bond of Miles, except to the extent that any such participant is paid from the said 2%;

(d) Any fee to any of the participants of Miles providing or arranging financing, or for providing working capital, except to the extent that any such participant is paid from the said 2%;

(e) Any subcontractor's profit to any participant of Miles except to the extent that any such participant is paid from the said 2%; and

(f) Any salaries to officers or Directors of Miles who are not actually on the job during construction, and carried on the job payroll of Miles, except to the extent that any of them is paid from the said 2%." [Par. 16, Findings of Fact, Great American Exs. AA and AC.]

The total amount of the contract between Miles Construction Corporation and the United States Government was established by the answers by Miles Construction Corporation to interrogatories propounded by appellee, Great American Insurance Company.

The interrogatory and answer were as follows:

"Q. What was the total gross amount of the contract or contracts, including all amendments, additions, and supplements thereto, entered into by Miles-Fairfax, Miles-Hawthorne, Miles-Naylor, Miles-Hendry, and Miles-Layden, joint ventures, hereinafter referred to collectively as 'Miles' for the construction of the Capehart Housing Project, exclusive of offsite work, at Little Rock Air Force Base, Jacksonville, Arkansas? A. $22,611,439.58 is the total amount for the Capehart Housing Projects. Offsite work was not a part of the Capehart Housing Project, and was not performed by any of the joint ventures named in this interrogatory." [Rep. Tr. p. 146, line 20, to p. 147, line 10.]

Full and final payment of the contract amount was made by the United States to Miles on May 13, 1960. [Rep. Tr. p. 147, lines 11-16 incl.]

The total gross income or total receipts of Miles under the construction contracts equaled the contract amount and was established by the answers of Miles to interrogatories propounded by Great American Insurance Company as follows:

> "Interrogatory No. 7. Q. Was the total gross income of Miles in connection with the Capehart Housing Project the sum of $22,611,439.58? If your answer is in the negative, state the actual total gross income and explain why said sum is greater or less than the sum of $22,611.439.58. A. The total gross income of Miles in connection with the Capehart Housing Projects was $22,-611,439.58. Miles had certain interest income which was not gross income in connection with the Capehart Housing Projects, and which is detailed in answer to Interrogatory No. 10 below." [Rep. Tr. p. 148, lines 6-18 incl.]
>
> "8. Q. What were the total receipts by Miles under the Capehart Housing contracts? If said sum is less than the total gross income of Miles, state what deductions are made by Miles to reduce the total income to contract income and the amount of each such deduction. A. The total receipts from the Government by Miles under the Capehart Housing contracts was $22,611.439.58." [Rep. Tr. p. 201, lines 9-18 incl.]

By its answers to interrogatories Miles Construction Corporation conceded that the total of all costs under the agreement of October 8, 1956, as amended, inclusive of the sum of $100,000.00 as Miles Construction Corporation's claim of the fee payable to

A. T. Locke, was not greater than $20,883.505.81 and was established as follows:

> "Interrogatory No. 22. Q. Does Miles, in its calculation of net return under the agreement of October 8, 1956, as amended, include as a cost of construction the sum of $100,000 as the fee to Locke under said agreement? A. Yes.
>
> Interrogatory No. 23. Q. What sum does Miles compute as the base total of all costs under the agreement of October 8, 1956, as amended, before any inclusion of 2 percent thereof as additional cost as provided in the agreements? A. $20,883.505.81 (including costs and expenses for the year 1961.)" [Rep. Tr. p. 149, lines 2-15 incl.]

Total base cost exclusive of any allowance for a fee under the agreements of October 8, 1956, as amended, were established by the following interrogatories as answers:

> "Interrogatory No. 29. Q. Based upon the answer to Interrogatory No. 23, what is the total base cost, prior to an allowance of 2% thereof, under said agreements, exclusive of an allowance for the fee payable under said agreements? A. $20,783.505.83." [Rep. Tr. p. 150, lines 15-21 incl.]

As the court will note, the agreement of October 8, 1956, as amended, provides that in the calculation of net return under Paragraph 12 there must be deducted a sum equal to 2% of the actual cost. This figure

was calculated by Miles and was established by the following interrogatory and answer:

> "Interrogatory No. 25. Q. The agreement of October 8, 1956, provides that there shall be deducted as cost, in arriving at net rerurn, 2 percent of all costs. What sum has Miles determined as 2 percent of all costs? A. $417,670.12." [Rep. Tr. p. 149, lines 16-21 incl.]

The figure of 2% of all costs calculated on costs exclusive of the $100,000.00 allowance for the fee of A. T. Locke and based upon the answer to Interrogatory No. 29 is as follows:

$20,783,505.81 X 2% = $415,670.12.

Net return under the agreement of October 8, 1956, as amended, as calculated by Miles Construction Corporation with the inclusion as a cost of the fee payable under the agreement was established by the following interrogatories and answers:

> "Interrogatory No. 26. Q. What sum has Miles calculated as net return under the agreement of October 8, 1956, as amended? A. $1,310,-263.63.
>
> Interrogatory No. 27. Q. What percentage has Miles determined as the net return upon the Capehart housing contracts as provided in the agreement of October 8, 1956, as amended? A. 5.795 percent. This percentage has been adjusted from that previously furnished to parties to this action by reason of the 1961 operating loss, the amount of which was not known at the time the previous percentage was furnished." [Rep. Tr. p. 149, lines 22-25 incl., and p. 150, lines 1-11 incl.]

The net return under the agreement of October 8, 1956, as amended, exclusive of any fee included therein as a cost is calculated as follows:

Contract Price and Total Receipts:		$22,611,439.58
Less: Total Costs	$20,783,505.81	
2% of total costs	415,670.12	
		21,199,175.93
		$ 1,412,263.65

Net return: $1,412,263.65 ÷ $22,611,439.58 = 6.25%

Accordingly, under the calculation of Miles Construction Corporation with the inclusion of the fee to be calculated as an item of cost in the calculation the base fee payable under the agreement of October 8, 1956, as amended, was claimed to be $100.000.00. The District Court determined that the fee payable under the agreement could not be included in the calculation of the fee and that, accordingly, the base fee payable under the agreement was $150,000.00.

Prior to the institution of the action, $15,000.00 was paid by Miles Construction Corporation to A. T. Locke and, accordingly, the court determined the net amount payable under the agreement to be the sum of $135,000.00.

Prior to the commencement of this action, A. T. Locke and John M. Sherman made various assignments of their interest in the fee payable under the agreements. These assignments are set forth in Paragraphs 6, 8, 9, 10, and 11 of the Findings of Fact

and are not contested here by Appellant. (Appellant's Op. Br. pp. 14 and 15.)

Miles Construction Corporation appeals from the judgment of the District Court so far as it awards to the assignees of A. T. Locke a sum in excess of $85,-000.00. In this connection, the appellee, Great American Insurance Company, concedes that the assignees described in the Findings of Facts referred to are possessed of assignments prior to the assignment of Great American Insurance Company and that, accordingly, it is the only party affected by this portion of the appeal. [Finding of Fact, Par. 12.] Miles Construction Corporation further appeals from that portion of the judgment which awards interest to the various assignees and the appellee, Great American Insurance Company, submits this brief on its own behalf and on the remaining appellees affected by this portion of the appeal.

Except as herein noted, appellee, Great American Insurance Company, accepts the statement of the case set forth by appellant, Miles Construction Corporation, save and except where argument is inserted therein as the conclusions of appellant.

ARGUMENT.

I.

Introduction.

The issues presented by appellant are twofold: First, whether or not in the calculation of a fee to be determined upon a percentage of net return, that is a percentage of the net results of receipts over expenses, the fee to be determined should as a matter of logic or law be included as an expense in the calculation. Second, whether or not interest under the agreement of October 8, 1956, as amended, became payable on or before 30 days after the date when Miles Construction Company received the final payment under its construction contract with the United States.

Inasmuch as Miles Construction Corporation concedes that its remaining assignments of error do not require a reversal (presuming but not conceding that the assignments are well taken) the appellee deems said assignments waived and no argument is presented herein on such issues.

II.

As a Matter of Law and Logic, in the Calculation of a Fee Dependent Upon a Percentage of Net Return, That Is the Excess of Receipts Over Expenses, No Deduction May Be Made on Account of the Fee to Be Paid. To Construe Any Agreement, Therefore, to the Contrary Would Result in an Absurdity.

The written agreements in question, being in particular the agreement of October 8, 1956, as amended by the agreement of December 27, 1956, provide that A. T. Locke will receive a fee or commission determined by the net return realized by Miles Construc-

tion Corporation. Paragraph 11 provides that if the net return is at least 3% but less than 6% of the total amount of the contract between Miles and the United States, A. T. Locke shall receive a fee or commission of $100,000.00, and if the net return to Miles is 6% or more, then Locke shall receive a fee of $150,000.00. Paragraph 12, as amended, provides that net return is defined as the amount by which the total receipts of Miles "exceed the aggregate of the cost of all labor, materials and services expended or incurred in bidding the said project, performing all acts necessary or appropriate to accomplish construction, and closing with the Federal Housing Administration and the Department of the Air Force, actual construction financing costs and expenses, and any and all other costs, expenses, charges, fees, taxes, (except Federal and State Income Taxes) deposits, bond premiums, travelling and other expenses of any nature whatsoever expended or incurred in connection with such project."

The question presented to the court is whether or not under the terms and provisions of the agreement of the parties there should be included as a cost or expense in the calculation of net return the fee or commission earned by the said A. T. Locke, and it is the position of Miles Construction Corporation that in the determination of a commission based upon a percentage of net return, there must be included in the calculation of the net return the very commission to be calculated. The utter absurdity of the position is obvious. Thus, for example, suppose that the net return earned were such that the inclusion of the fee of $100,000.00 as a cost resulted in a net return in excess of 6%, whereas the inclusion of a fee of $150,000 as a cost

resulted in a net return of less than 6%. If the net return were in excess of 6%, the payee would be entitled to $150,000, but the inclusion of that $150,000 reduces the net return to less than 6% thereby reducing the fee to $100,000 but that in turn creates a return in excess of 6% and a fee of $150,000 and so on in endless circle of reasoning. Such a situation could not possibly be resolved by judicial authority and its very impossibility illustrates the unsound construction urged by Miles Construction Corporation. This result, it is noted, is achieved in any attempt to include, in the calculation of a contingent fee or commission, the commission itself to be paid. We know of no rule of law which would require this court to give a legal document a ridiculous, absurd, and impossible construction.

Miles Construction Corporation has failed to submit one single case which would support the strange construction which it now urges upon this court, and we are frank to state that our research has failed to disclose any such case. The obvious weight of judicial authority is to the contrary and a review of pertinent decisions is as follows:

In the case of *Shields v. Rancho Buena Ventura,* 187 Cal. 569, the plaintiff had entered into an agreement with the defendant whereby he agreed that he would manage the defendant's ranch and that if sufficient net profits were realized for such payment he would receive the sum of $1,500.00 per year. His agreement provided that in the determination of these profits there should be deducted "all expenses incurred in the management of the ranch, including the household and living expenses of himself and family."

(Page 371.) The plaintiff brought an action for the agreed sum urging that sufficient funds had been earned so as to entitle him to the fee. In its consideration of the case, the court examined the accounts and noted that the commission item had been entered as an expense in the determination of profits as accrued for payment. In the determination of whether sufficient profits had been made to entitle the plaintiff to the recovery he sought, the Supreme Court of California specifically held that the commission items accrued had to be eliminated as expenses and were not to be considered in the determination of whether or not sufficient profits had been made (page 575) and affirmed judgment rendered for the plaintiff.

In the case of *Bishop v. Kelley,* 100 Cal. App. 2d 775, a case remarkably similar to the instant case, the defendant, an estimator, had a written contract whereby he would receive from the plaintiff, general contractor, a stated salary plus 25% of the net profits of work bid by the plaintiffs as a general contractor. The matter was referred to a referee to take an account of the net profits. In its definition of what the referee was to consider as net profits (page 781) it is significant to note that the court did not require that the commission should be deducted from the profits in order to determine the amount to which the defendant was entitled but provided only for deduction of the actual salary that was paid to him. Upon appeal, and although reversed on another point, this particular reference to the referee was affirmed by the court.

Other California cases involving a percentage of profits as compensation in which the court makes no deduction in arriving at net profits because of the

compensation which would be payable are *Kales v. Houghton,* 190 Cal. 294; *Bernstein v. Sirotta,* 213 Cal. 21; and *Boradori v. Peterson,* 86 Cal. App. 753.

In addition to applicable California authorities, there are pertinent Federal decisions.

In the case of *Rogers v. Hill,* 289 U. S. 582, the corporate bylaws authorized the corporation to pay its officers a certain percentage of its profits as compensation. The plaintiff contended that the bylaw was invalid since the charter provided that all profits should be applied to the acquisition of property and the payment of dividends. In its decision, the court pointed out that the term net profits, as used in the bylaw in question, included as the profit the commission or salary payable to the officer; *i.e.,* that such was not deductible in the determination of net profits to determine their commissions, and that the term net profits as used in the charter did not include as profit the commission paid to the officers but was the resultant net profit after such payment.

In the case of *Winkleman v. General Motors Corporation,* 44 Fed. Supp. 960, the court was called on to determine whether a bonus should be included as an expense in the calculation of net earnings under a bonus plan. The court pointed out that the agreement in question contained no express provision for the inclusion of the bonus as an item of expense in the calculation of net earnings and stated "I think it was reasonable not to include in the course of the calculations, the very item to be determined" . . . "it is contrary to the concept of profit sharing to have any part of the bonus charged against the recipients share

of the profits." (Page 1,000.) The court further quoted applicable authorites as follows: "Considered in the light of ordinary practical business experience, it would be unreasonable in ascertaining the amount of net profits or net earnings to include the bonus beneficiaries share as part of the expense of the concern," (page 1,000), citing *Selz v. Buell,* 105 Ill. 122, 130; *Briggs v. Groves,* 9 N. Y. S. 765, 30 N. E. 865; *Holmes v. James Buckley & Co.,* 165 La. 874, 166 So. 219, 221; *Epstein v. Schenck,* 35 N. Y. S. 2d 969; and *Rogers v. Hill,* 289 U. S. 582.

Numerous cases are annotated in 49 A. L. R. 2d 1136. The head note to the annotation reads:

> "The amount of the bonus or extra incentive compensation paid to the bonus recipient should not upon the grounds that it is repugnant to the purposes of the benefit to permit such charge to be deducted as an expense in calculating a corporate employers net profit earnings, as the base for computing such benefit."

In the interpretation of the written agreements in question, the following sections of the California Civil Code are applicable:

> Section 1636—
>
> "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."
>
> Section 1638—
>
> "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

Section 1643—

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

Section 1653—

"Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected."

Section 1654—

"In cases of uncertainty not removed by the preceeding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

In its opening brief, appellant would seem to contend that *Bishop v. Kelly, supra,* and *Winkleman v. General Motors, supra,* support the position assumed by it. It is respectfully submitted that these cases together with the other cases heretofore cited support the general principal that it is repugnant to the very meaning of a fee determined upon the basis of net return to include as an expence the very fee to be calculated for its logically impossible and results in an infinite number incapable of calculation.

So that there may be no question on the point, the court's attention is respectfully invited to the fact that the mere accrual by Miles of the fee payable under

the agreements does not pursue classify such fee as an expense. *Iowa So. Utilities Co. v. Cassill,* 69 F. 2d 703, 706.

In addition to the foregoing, the court's attention is respectfully invited to the interpretation placed by Miles Construction Corporation upon the agreements in question. In its certificates to the contract renegotiation board as required by Title 50, Section 1215-(e) (1) U. S. C., Miles Construction Corporation certified that the amount payable to A. T. Locke under the agreements was $135,000. [Rep. Tr. p. 153, lines 23-25, p. 159, linees 1-5, and lines 22-25, and p. 155, lines 1-11.] At no time did Miles inform the contract renegotiation board that any sum less than $135,000 was payable under the agreements.

In its tax returns to the United States, Miles set forth a liability to A. T. Locke in the sum of $135,-000. [Rep. Tr. p. 78, line 13, to p. 79, line 21.]

On September 1, 1960, Miles purchased $135,000 in United States treasury bills to provide for the payment of the fee under the agreements. [Rep. Tr. p. 150, line 22, to p. 151, line 4.] Finally, Miles Construction Corporation carried on its books and records a liability to A. T. Locke of $150,000 (to which, of course, there was a credit of $15,000 previously paid). [Rep. Tr. p. 99, lines 1-9 incl.] Not until the commencement of the instant action was Miles' position any other than that $135,000 was payable under the agreements. [Rep. Tr. p. 99, lines 10-25 incl.]

From the appellant's opening brief it would appear to be the position of Miles that since the fee under the agreement amounts to $135,000 the within judgment

results in a net return to Miles of less than 6%. We cannot see where the agreement is susceptible to such interpretation. The agreement in question was prepared by Miles Construction Corporation [Rep. Tr. p. 13, lines 15-23 incl.] and any ambiguity therein is construed against Miles Construction Corporation. Section 1654 California Civil Code. The absurdity of the position of Miles is illustrated by its own argument for in the event that the fee to Locke under the agreements even though unpaid is included as an expense it results in a net return in excess of 6% only upon rendition of judgment herein is the sum to be paid. This results in an effective net return to Miles in excess of 6% at the present time and under the express terms of the agreement the sum of $150,000 therefore becomes payable.

III.

Miles Construction Corporation Incorrectly Concludes That Total Receipts of Miles Under the Agreements Were Other Than Contract Payments to Miles From the United States Government.

In Section 4 of its opening brief (commencing page 36) appellant argues that amounts received through litigation subsequent to May 13, 1960, affect the calculation of the fee under the agreements. This is clearly incorrect. Paragraph 12 of the agreements provides that net return is the amount by which "total receipts . . . under the contract" exceed the aggregate of all costs. Total receipts under the contract were and are as admitted and conceded by Miles to be the total sum paid by the government to Miles Construction Corporation in the sum of $22,611,439.58. [Rep. Tr. p. 201, lines 9-18 incl.]

The expenses authorized in determining net return are by Paragraph 12 defined as expenses "of any nature whatsoever expended or incurred in connection with such project."

By its answers to interrogatories Miles Construction Corporation conceded that no construction costs or expenses in connection with the project were paid or incurred after December 31, 1960 and that such construction costs were $20,504,090.61. [Rep. Tr. p. 148, line 19, to p. 149, line 1.]

Thus it is noted that although Miles states that substantial sums were recovered by it through litigations, no such recovery is utilized by Miles as increasing total receipts under the contract as defined in Paragraph 12 of the agreement.

IV.

The District Court Correctly Held That Interest Was Payable Under the Agreement From and After 30 Days After Final Payment Was Received by Miles From the United States.

The agreement of October 8, 1956, as amended, provides that payment thereunder shall be due on or before 30 days after the latter occurrence of the following events:

1. Final payment from the government,

2. Final payment of "all costs and expenses incident to the performance of said contract," or

3. The date upon which Miles determines by proper accounting procedures net return under the agreement.

Clearly upon ascertainment of total income and total expenses, net return is capable of calculation and it, therefore, follows that the appellant could not by its

unilateral action refuse to calculate net return so as to extend the time for payment. *United States v. Peck,* 102 U. S. 64, *Van Duskin v. Kuhns,* 164 Cal. 472.

The court may note that in the usual course of practice the United States does not pay final payment under a contract until all costs and expenses of the contractor have been certified to as paid and in the usual course of events total expenses would be known prior to final payment by the government. Miles Construction Corporation contends that this second provision of the agreement is applicable and yet it fails to illustrate one single expense paid after May 13, 1960.

Illustrative of the position taken by Miles Construction Corporation is this subject of the calculation of net return. Although Miles contended, even at trial, that it was incapable of calculating net return the evidence established that such a calculation had been made on prior occasions. [Rep. Tr. p. 151, lines 5-16 incl.]

In the action, Miles Construction Corporation took the position that the only costs and expenses unpaid were attorneys fees, court costs incident to uncompleted litigation, and the amount which the court might adjudge payable in this action [Rep. Tr. p. 200, line 12, to p. 201, line 1] asserting that no interest whatsoever was due for the reason that the fee payable under the agreement was an expense and consequently all expenses had not been paid. In its lack of candor to the court, the responsibility lies with the appellant. It is submitted that costs and expenses "incident to the performance of the contract" are not the attorneys fees and costs involved in independent litigation and that to construe such expenses or general office overhead as expenses incident to the performance of a contract

would be improper for the reason that after May 13, 1960, the contract had been performed, final payment received, and it would be impossible for Miles to pay costs for such performance thereafter. Accordingly, the interest award from and after 30 days after May 13, 1960, the date when final payment was received, (June 13, 1960) was eminently proper.

It is submitted that the fact that the contract might possibly have been renegotiated in that it involves only a possibility did not and does not constitute grounds for the refusal by Miles to calculate net return.

Conclusion.

Appellee respectfully submits that the judgment of the District Court was clearly proper and correct. The agreements involved were drawn by Miles Construction Corporation through its attorneys and said agreements do not provide for the construction urged by appellant. Clearly were it the intent of the agreements to provide that the fee should be determined as a cost in calculating net return, it would be specifically set forth to that effect and similarly if the date of payment were to await the pleasure of appellant for many years while it engaged in litigation, it would be necessary that the agreements so provide.

For the reasons stated, Appellee respectfully requests that the judgment be affirmed.

Respectfully submitted,

ANDERSON, MCPHARLIN & CONNERS,
Attorneys for Appellee, Great American Insurance Company.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LUTHER L. JENSEN